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FILED
MAY 31 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 852

MANUEL M. BERNSTEIN AND WARREN S. SHAW, T/A MANNING SHAW REALTY COMPANY,
Appellants,

vs.

REAL ESTATE COMMISSION OF MARYLAND AND ALLEN KLEIMAN AND JEANETTE KLEIMAN, HIS WIFE, AND BERNARD CHERRY AND DORA CHERRY, HIS WIFE,
Appellees.

MANUEL M. BERNSTEIN AND WARREN S. SHAW, T/A MANNING SHAW REALTY COMPANY,
Appellants,

vs.

REAL ESTATE COMMISSION OF MARYLAND AND ALLENDALE LYNDHURST IMPROVEMENT ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPELLANTS' ANSWER TO APPELLEES' MOTION TO DISMISS THE APPEAL

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The Maryland Court of Appeals Declared the Federal Question Here Raised Adversely to the Appellants' Contention in this Court.

The principal basis of the Appellees' Motion to dismiss the Appeal is that the Federal question here raised was not

briefed or argued to the Court of Appeals nor decided by it. It is of course true that the Appellants did not include in their brief to the Court of Appeals the Federal question which they seek to have reviewed in this court; it is also true that the record does not show that the Appellants argued the Federal question to the Court of Appeals. From this the Appellees argued that the Federal question was waived and cannot now be raised on appeal to the Supreme Court of the United States.

The law, however, is clearly contrary to the Appellee's claim. In the case of *Gross v. U. S. Mortgage Co.*, 2 S. Ct. 940 (1883), this Court had before it the question of whether, in determining the question of its jurisdiction in a case, it might refer to the opinion of the State Court. In that case the record did not disclose upon its face that the Federal question sought to be raised on Appeal had been decided by the highest court of the State adversely to the Appellant's claim. However, the opinion of the State Court clearly disclosed that the Federal question had in fact been decided by that Court. This Court said:

> "In the existing State of the law, it is our duty to examine the opinion of the State Court of Illinois in connection with other portions of the record for the purpose of ascertaining whether this Writ of Error (now appealed) properly raises any question determined by the State Court adversely to the right, title, or immunity under the Constitution or laws of the United States and specifically set up and claimed by the party who brings the writ."

The *Gross* case therefore establishes the principle that the Supreme Court of the United States has the right and the duty to refer to the opinion of the highest court of the State for the purpose of determining whether the Federal question brought on Appeal has been decided by that State

court. The *Gross* case has not been overruled and the principle is still sound law.

The *Gross* case relied upon *Murdock v. City of Memphis*, 20 Wall 633, which appears to be the first decision of the Supreme Court of the United States in which the principle established in the *Gross* case was recognized. In the *Murdock* case, the Court abandoned the former practice of restricting its scrutiny to the face of the record. It was there said that in determining whether a Federal question was raised and decided in the State Court, this Court has been inclined to restrict its inquiry too much by the express limitation "to the face of the record". The restriction to which the Court referred in *Murdock* was one which evolved from the Judiciary Act of 1789, Section 25, which provided that the State court, when reviewing a final judgment or decree of the highest court of a State, must restrict itself to a consideration of such errors as appeared "on the face of the record." *Murdock* was decided after the passage of the Act of 1867 and that act omitted the restriction contained in Section 25 of the Act of 1789.

It is therefore today well-settled that the Supreme Court may consider the opinion of the State court whose judgment is being reviewed for the purpose of determining whether the Federal question before this Court has been decided adversely to the contention of the Appellants.

In the present case, the Opinion of the Court of Appeals of Maryland contains an extensive discussion of the Constitutional point raised by the Appellants before the Real Estate Commission of Maryland and in the Baltimore City Court on appeal from the Commission. The Opinion of the Baltimore City Court was essentially that even though the Complainants sought to accomplish the unconstitutional

purpose of preventing the sale of property to Negroes in formerly all-white neighborhoods, i.e., so-called "block-busting", the fact that the Real Estate Commission of Maryland did not share the unlawful motives of the Complainants remove the constitutional question from the case. The Judge in the lower court stated as is indicated at pages 9 and 27 of the Appellant's Jurisdictional Statement that the Commission asserted early in the hearing and reiterated throughout the proceeding that it was not interested in "block-busting" and would not consider evidence bearing upon the issue. Therefore, the lower court decided, no constitutional rights of these Appellants had been abridged.

With this opinion of a lower court, the Court of Appeals of Maryland stated that it was in complete accord. The Court stated:

> "Whatever may have been the real motive of the Complainants, the Commission early in the proceedings before it, made it clear and continued to reiterate, that the hearing was for the sole purpose of determining whether Bernstein and Shaw had violated the law in connection with the exercise of their rights under the licenses issued to them and that the Commission was not concerned with block busting. Furthermore, we think the lower court was correct in refusing to receive into evidence even an explanatory background, the proffered exhibits with regard to publicity given the accusation. At the conclusion of the hearing on appeal below, the lower court found no basis in the record to believe it was either biased or arbitrary in the manner in which it conducted the proceedings before it. The question is not specifically before us on the appeal and we shall not consider it further."

It is clear from the opinion of the Court of Appeals, that the constitutional question raised in this case was

decided by that Court. The lower court, in its opinion as we've indicated above, stated that the motives of the complainants in bringing the Complaints before the Commission were in essence immaterial. It said, as did the Court of Appeals, that whatever the motives of the Complainants might have been, the Commission's assertion during the hearing that it was not concerned with Block Busting removed the constitutional question from the case. The lower court also refused to receive into evidence the proffered exhibits which these appellants sought to introduce for the purpose of showing the unlawful motives of the complainants. The Court of Appeals in its opinion approved the lower court's determination of both of these issues, and both of these issues were related inextricably to the constitutional question which these appellants here assert.

If the Court of Appeals, in its opinion, had concluded the statement above quoted, with the phrase "we agree with the lower Court's determination of the constitutional questions raised by the appellants before it" instead of with the phrase "The question is not specifically before us", it would be clear that this Court had jurisdiction. It can therefore hardly be contended that a mere change in phraseology at the conclusion of a portion of a court's opinion in which it decides a constitutional question can have the effect of depriving the Supreme Court of the United States of jurisdiction that it otherwise has. As this Court has held in numerous decisions, the question is not whether the Federal question was argued and briefed in the Court below, but whether the court below decided the Federal question adversely to the party seeking review in this court.

It is clear from the opinion of the lower court, and the opinion of the Court of Appeals referring to that lower court's decision of the constitutional question, that the

Court of Appeals decided the question here raised adversely to the asserted rights of the appellants in this case.

Moreover, it is perfectly clear under the Maryland decisions that the language of the Court of Appeals with reference to the constitutional question is of such a character that under the court's own decisions, the Maryland Court of Appeals would be obligated to follow it in future cases. See: *Alexander v. Worthington*, 5 Md. 471; *Michael v. Morey*, 26 Md. 239, 90 Am. Dec. 106; *McGraw v. Merryman*, 138 Md. 247, 104 A. 540.

Therefore, for practical purposes and in terms of substance as distinguished from legal form, it is clear that the constitutional question which these appellees asserted before the Commission and reasserted before the Baltimore City Court was decided by the Court of Appeals of Maryland; and it was decided by that court adversely to the constitutional rights which these appellants now assert.

The Appellees' reference to the Appellants' motion for reargument in the Court of Appeals is immaterial. Obviously it makes no difference whether a motion for reargument was filed or not; for if the Court of Appeals did in fact decide the Constitutional question, and it is clear that it did as indicated above, the fact that the appellants sought to argue the constitutional question by a motion for reargument has no effect upon this court's jurisdiction. It is of course true as the appellees assert that where a constitutional question is raised for the first time on motion for reargument and the State Tribunal refuses to hear argument, the constitutional question has not been properly reserved for purposes of this Court's jurisdiction. Such is not the case here however. As has been stated the Federal rights of these appellants were asserted before the Commission and the Baltimore City Court and denied

in both instances and the Court of Appeals of Maryland in its opinion approved the denial of the asserted Federal rights in the tribunal below.

The State Statute As Applied Was Drawn in Question Within the Meaning of the Judiciary Act Conferring Jurisdiction upon this Court.

The Appellees' claim that the Appellants have no right of appeal under the Federal Statute conferring jurisdiction upon this Court because no state statute was drawn in question on the ground that it denies a right conferred upon the party seeking review by the United States Constitution or by a federal statute. This contention in similar cases, has been made and rejected by this Court on numerous occasions. One of the earliest cases in which the Appellees' contention was laid to rest is *Myles Salt Company v. Board of Commissioners of The Iberia and St. Mary District*, 239 U.S. 478, 36 S. Ct. 204, 60 L. Ed. 392. In that case the court held that even though a direct attack upon a State's Statute as drawn was not made, if the action taken by an Administrative Agency of a State was taken pursuant to statutory authority and the highest court of the state sustains such action against asserted constitutional rights, the action taken is in effect a part of the statute for purposes of judicial review by this court on Writ of Error (now appealed). And if the action taken pursuant to the statute does deny asserted federal or constitutional rights, this court will not permit a decree arising out of such action to stand. The language of the Supreme Court in the *Myles* case is worth quoting (at page 206 of 36 S. Ct.):

> "It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked, and it is asserted to be a violation of the constitution of the

United States. The question presented is Federal and the Motion to dismiss is denied."

The same result for similar reasons was reached in case of *Sultan Railway and Timber Company v. Department of Labor and Industries*. 277 U.S. 135, 48 S. Ct. 505 (1928). There an order made by a state bureau pursuant to statutory authority was attacked on constitutional grounds. It was contended that the order, rather than the statute was attacked and therefore this court lacked jurisdiction within the meaning of Section 237 of the judicial code authorizing appeals to the Supreme Court of the United States. The contention was rejected for the reasons set forth by the court in the *Myles* case. The principle was again applied by this court to take jurisdiction in *McCollum v. Board of Education of Schools District No. 71*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 648, 2 A.L.R. 2d 1338. There the attack was made upon a program of religious instruction in public schools which program was held by the highest court of the State to have been authorized by state statute. The contention was made in that case that the statute itself had not been drawn in question within the meaning of the Federal Statute conferring jurisdiction upon this court, and the contention was again rejected by this court for the reasons announced in the *Myles* and *Sultan Railway* cases among others.

The Appellees seek to distinguish this case from those cited above upon the ground that the Order issued by the agency must be legislative in character. They argue that the Order in the case at Bar is specific, particular and individual, and does not lay down a rule for future application; and they assert, therefore, that the principle of *Myles*, *Sultan Railway* and *McCollum* and cases therein cited, does not apply. This is a novel argument. In sub-

stance it asserts that constitutional rights may not be denied by administrative orders issued pursuant to statutory authority if the order is of such a character that it has general application to future cases, but that constitutional rights may be denied by such administrative orders if they have application only to particular individuals. None of the cases cited by the Appellees in their Motion to Dismiss or Affirm, and no case which these appellants have discovered would sustain such an invidious distinction. Constitutional rights are individual rights as this court has held in numerous decisions.

The Question Here Presented Is A Substantial One

The Appellees claim in their Motion to Dismiss or Affirm that the question at bar is not a substantial one. They assert that the Commission was merely enforcing the regulatory provisions of the Maryland Real Estate statute, and therefore no substantial Federal question is involved. However, as is indicated in the opinion of the Baltimore City Court and the opinion of the Maryland Court of Appeals, it is well settled that all persons have a constitutional right to purchase and sell property wherever situated without regard to race, color, creed, or national origin. Citing *Shelly v. Kramer*, 331 U.S. 803, 67 S. Ct. 1751, 91 L. Ed. 1826.

In the present case, the sole purpose of the complaints which were filed against these Appellants was to prevent so-called block busting, i.e., the sale to Negroes of homes in formerly all-white neighborhoods. Therefore, the motive which gave rise to this procedure was a purpose forbidden to the state itself by the Constitution. It is clear that if the Real Estate Commission had by its own authority, sought to deprive these Appellants of their licenses to prevent them from selling property to Negroes in formerly all white neighborhoods, the Commission's

Order could not stand. It is also true, on the other hand, that the Commission as an agency of the State of Maryland has the right and the duty to exercise the State's authority for the purpose of protecting its citizens against substantial evils. But where the primary purpose of invoking the powers of a state agency is really to accomplish an unconstitutional purpose, that is, a purpose which the state may not constitutionally pursue, the evil which is made the subject of state authority must be real and substantial, as distinguished from trivial and technical. See *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1959).

In the present case as is stated in the jurisdictional statement (page 10) the sole act for which these appellants were penalized was the alleged posting of a Sold sign on property which allegedly had not been sold. Assuming that the evidence would sustain the commission's finding of fact in this regard, which is not conceded, it would nevertheless follow that no substantial interest of any citizen of Maryland or of the State itself was invaded by the alleged act. Consequently, the sole evil which was condemned and sought to be penalized by the Commission's Order was the technical violation of the State's statute as construed by the Court of Appeals of Maryland. This is also true of the alleged unlawful listing agreement. The Agreement itself and all the evidence showed that these Appellants' listings continued for six months only and therefore in substance, as distinguished from legal form, contained a "definite termination date."

The appellees argue that the provision in the Agreement preventing the termination of the Agreement while negotiations are pending renders the Agreement unlawful under the Maryland Statute. This argument is difficult to follow

in view of the settled law in this jurisdiction that a broker who procures a sale in conformity with the listing agreement is entitled to his commissions even though the seller changes his mind and terminates the contract. *Jones v. Adler*, 34 Md. 440; *Howard v. Street*, 93 A. 923, 125 Md. 288.

Therefore the provision in the Agreement is not unlawful in as much as it is merely declaratory of rights conferred upon the broker by the Common law of this state. From all this it follows that the alleged unlawful listing agreement was held to be unlawful merely because it contained language which on its face did not appear to be in strict conformity with technical statutory requirements.

In both cases therefore these Appellants' licenses have been put in jeopardy on complaint of citizens seeking to use a State Agency to deprive the Appellants of their constitutional rights and the Commission has invoked its powers to suspend their licenses for alleged violations of statutory requirements which are technical and trivial as distinguished from real and substantial. What we have said clearly indicates the importance of the constitutional question here presented.

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